PACIFIC LEGAL FOUNDATION

November 16, 2020

Agenda Item C-3
Henderson City Committee
P.O. Box 95050
Henderson, Nevada 89009

Dear Committee Members:

This letter is in opposition to Bill No. 3480, regulating short term rentals in Henderson. This Bill creates a Hobson's choice for would-be short-term rental hosts ("hosts"). It makes permits for short term rentals contingent on forfeiting Fourth Amendment rights. The City cannot demand that property owners surrender their right to be free from unreasonable searches as a condition of granting a permit. Warrantless searches are presumptively unreasonable and are only constitutional where other procedural safeguards are in place or specific warrant exceptions apply. This Bill does not provide safeguards and does not invoke any warrant exceptions.

In proposed sections related to standards for issuance of a permit to operate a short-term rental, Bill No. 3480 institutes warrantless searches of both records and real property. §§19.5.3.G.2(t), (x), and (y), propose to require hosts to create records of private activity that must then be turned over to the City upon request. 19.5.3.G.2(t) ("Subsection T") requires hosts to install a security camera and make two months of footage available to the City upon request. 19.5.3.G.2(x) ("Subsection X") requires hosts to install noise monitoring devices and turn over recorded noise data to the City upon request. 19.5.3.G.2(y) ("Subsection Y") goes even further, requiring that all short-term rentals be made available for inspection upon request. In addition to standards for issuance, Bill No. 3480 also proposes registration and renewal requirements that

invade hosts' privacy. 19.5.3.G.3(j) ("Subsection J") purports to give the City the right to inspect the short-term rental after merely giving notice to the property owner during the registration period. 19.5.3.G.3(m)(7) ("Subsection M7") similarly attempts to empower the City to inspect the property during the renewal period after giving notice to the property owner. Violation can result in fines up to $500 per day, 19.11.E.3(a)(3), or revocation of the permit to engage in short-term-rental hosting, 19.11.E.2(d)(1).

Both the mandatory disclosure of records and the physical inspection of hosts' property are searches because they allow the state to invade constitutionally protected areas. The records are protected "papers" and the physical spaces are "houses," matching perfectly with the Fourth Amendment's text. If an area is constitutionally protected, government invasion of that area is a search and collecting evidence in that invasion is a seizure, triggering Fourth Amendment protections. Searches without warrants are presumed to violate the constitution.[1] The City cannot overcome that presumption here because of the way the Bill is written.

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PLF is one of the nation's most preeminent public interest law firms. Since 1973, PLF has advocated for individual rights and limited government in state and federal courts across the

[1] *See, e.g., Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 529 (1967).

United States. Specifically, PLF is known for its robust defense of property rights,[2] which includes the Fourth Amendment's guarantee against unreasonable searches of private property.[3]

1. THE FOURTH AMENDMENT PROTECTS HOSTS' BUSINESS RECORDS AND PROPERTY.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures..."[4] The Bill would allow the City to search hosts' papers and houses at will, in violation of the Fourth Amendment.

a. BUSINESS RECORDS OF CUSTOMER INFORMATION ARE "PAPERS" PROTECTED BY THE FOURTH AMENDMENT.

The Supreme Court of the United States dealt with the specific question of business records in *City of Los Angeles v. Patel*. In the *Patel* case, the Court found that a Los Angeles ordinance that required hotel operators to record the personal information of guests and turn it over to authorities under pain of criminal sanction was unconstitutional.[5] Similarly, this Bill would require hosts to record the comings and goings of their guests and then produce those records to the City. In *Patel*, the Court specifically rejected the argument that the City did not

[2] *See, e.g., Knick v. Township of Scott*, 139 S. Ct. 2162 (2019); *United States Army Corps of Engineers v. Hawkes Co*., Inc., 136 S. Ct. 1807 (2016); *Koontz v. St. Johns River Water Management Dist*., 570 U.S. 595 (2013); *Sackett v. E.P.A.*, 566 U.S. 120 (2012).
[3] *See, e.g., Stavrianoudakis, et al., v. United States Fish & Wildlife Service, et al.*¸ No. 1:18-cv-01505 (E.D. Cal. filed Oct 30, 2018); *Taylor v. City of Saginaw, et al.*, 2020 WL 3406732 (6th Cir. 2020) (*amicus curiae*) (motion for leave to file pending); *Hotop v. City of San Jose*, 2019 WL 1580736 (9th Cir. 2019) (*amicus curiae*) (motion for leave to file pending); *LMP Services, Inc. v. City of Chicago*, 2019 WL 2218923 (Ill. 2019) (*amicus curiae*).
[4] *Riley v. California*, 573 U.S. 373, 381-82 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).
[5] *Id.* at 428.

need a warrant because 1) it had a "special need" for the records and 2) that the industry was so regulated that no expectation of privacy was reasonable. The Fourth Amendment's prohibition on unreasonable searches required that the hotels have the opportunity to dispute the search's scope or necessity before a neutral arbiter. It is beyond dispute that the kind of business records created by Subsection T and Subsection X are of the same type and purpose as those demanded by the City in the *Patel* case,[6] and are protected by both the privacy-based,[7] and property-based approaches under the Fourth Amendment.[8]

b. HOSTS' PROPERTY IS RESIDENTIAL, REAL PROPERTY AND ENTITLED TO THE PROTECTION.

Whether the property used for short-term rentals is considered residential or commercial, it is protected by the Fourth Amendment.[9] Real property is one of the oldest and most easily understood areas of Fourth Amendment protection.[10] Many of these hosts are going to be providing short-term rentals in their own homes, a place where privacy interests are at their "zenith."[11] The City cannot grant itself permanent admittance with the stroke of a pen.

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[6] *Patel*, 576 U.S. at 419-423 (hotel guest registry was protected papers under the Fourth Amendment); *Patel v. City of Los Angeles*, 738 F.3d 1058, 1061 (9th Cir. 2013) (same). *See also Hale v. Henkel*, 201 U.S. 43, 76 (1906) ("[T]he substance of the [Fourth Amendment] offense is the compulsory production of private papers.").
[7] *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
[8] *See United States v. Jones*, 565 U.S. 400, 407 (2012).
[9] *Patel*, 576 U.S. at 420 (holding that Fourth Amendment protections "appl[y] to commercial premises as well as to homes.") (quoting *Marshall v. Barlow's Inc*., 436 U.S. 307, 312 (1978)).
[10] *See Kyllo v. United States*, 533 U.S. 27, 31, 121 S. Ct. 2038(2001) (noting that property and privacy grew up together but had been decoupled)
[11] *U.S. v. Scott*, 450 F.3d 863, 871 (9th Cir. 2006).

2. BECAUSE HOSTS' RECORDS AND PROPERTY ARE PROTECTED, CITY MAY ONLY SEARCH THEM UNDER SPECIFIC CIRCUMSTANCES, WHICH ARE NOT PRESENT.

The "ultimate touchstone" of the Fourth Amendment is "reasonableness." Whether a given search is reasonable is most readily determined by the issuance of a warrant by an impartial judicial officer supported by sufficient cause. All warrantless government searches conducted outside this judicial process "are per se unreasonable . . . subject only to a few specifically established and well delineated exceptions."[12] The Fourth Amendment places the burden on the government to prove that one of the narrow exceptions to the warrant requirement is applicable.[13] Even if a warrant is not required, reasonableness is always an element of Fourth Amendment analysis. That is the position the City is in here. While a full warrant process for each inspection is probably not necessary, all of the possible exceptions to the warrant requirement still include procedural protections that are both constitutionally sufficient to protect the private parties at issue, but less onerous on the City. This Bill includes no procedural protection against arbitrary searches at all.

[12] *Riley v. California*, 573 U.S. 373, 381-82 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).
[13] *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971).

a. THE CITY HAS NOT MET THE FOURTH AMENDMENT'S STANDARDS FOR A "SPECIAL NEEDS" SEARCH.

The so-called "special needs"[14] exception to the Fourth Amendment's warrant requirement may apply here, allowing the City to rely on an administrative process, rather than a judicial process, to get approval for an inspection or search. This process must provide the targets of administrative searches an opportunity to object to the scope and intent of the search in front of a neutral arbiter before complying with the searches. In *Patel*, the Court held that "absent consent,[15] exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain pre-compliance review before a neutral decisionmaker."[16]

b. DESPITE EXISTING REGULATIONS FOR HOUSING INDUSTRY, THE INDUSTRY IS NOT SO REGULATED THAT HOSTS SHOULD EXPECT TO LOSE RIGHTS TO ENTER IT.

The government's right to regulate an activity does not also give it the right to search to enforce those regulations.[17] The City has the right to regulate short-term rentals, but the industry is not so regulated that hosts should expect to be subject to standardless searches merely for engaging in that industry. Under the exception to the Fourth Amendment's warrant requirement

[14] This exception allows searches that are not for typical criminal law enforcement purposes to proceed based on less than reasonable suspicion if such a high suspicion requirement would be impracticable. *See, e.g., U.S. v. Scott*, 450 F.3d 863 (9th Cir. 2006) (describing the special needs exception but finding that the doctrine did not apply).
[15] Consent is discussed in part 2.C, below.
[16] *Patel*, 576 U.S. at 420.
[17] *Patel*, 576 U.S. at 425.

for "heavily regulated" businesses, certain industries are held to have no reasonable expectation of privacy over their stock due to the historical operation of pervasive regulation.[18] This exception is extremely narrow.[19] The Supreme Court has only recognized its operation in four discrete industries all implicating an inherent danger to public health and safety.[20] For short-term rentals, the most analogous industry is hotels. The Supreme Court has already dealt with that question in *Patel*, holding that the industry is not subject to this exception.

c. BY APPLYING FOR A LICENSE UNDER THIS LAW, HOSTS ARE NOT GIVING CONSENT TO THESE SEARCHES.

The City cannot force business owners to choose between facing enforcement penalties or having their rights violated.[21] Although the City is within its rights to regulate short-term rentals and is granting the licenses required as a benefit, the City cannot make benefits contingent on a waiving the Fourth Amendment's protection. For a full analysis of the limits on the City's right to exact waivers from applicants, please see Kathleen M. Sullivan's article

[18] *Id.* at 424 (quoting *Marshall v. Barlow's, Inc*., 436 U.S. 307, 313 (1978)).
[19] *Id.* at 424-425.
[20] *See Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (penalties imposed for refusal to allow warrantless search of liquor licensee premises constitutional); *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless search of gun dealer's locked storeroom constitutional); *Donovan v. Dewey*, 452 U.S. 594 (1981) (warrantless health and safety search of underground mines constitutional); *New York v. Burger*, 482 U.S. 691 (1987) (warrantless search of vehicle dismantling businesses constitutional).
[21] *Patel*, 576. at 421. *See Also, Scott*, 450 F.3d at 866 (holding that the government cannot exact a Fourth Amendment waiver in exchange a benefit, even if the benefit is purely in the government's discretion to give or withhold).

Unconstitutional Conditions, published in the Harvard Law Review and relied upon by the 9th Circuit in addressing such issues.

3. CONCLUSION

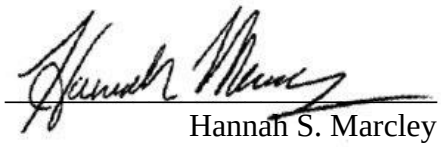
The reasonableness standard the Fourth Amendment provides is a guard against arbitrary exercises of power.[22] This Bill invites that arbitrary action by not providing standards for when a search is appropriate, not providing a limit on the number of searches, and not providing the hosts the opportunity to challenge the searches. As it is written, if a vindictive inspector searched a home every day for a month while telling the host that it was because the inspector did not like the hosts political yard sign, the host would still have no grounds to refuse the inspector entry without facing penalties. The host may have other recourse, but none that would stem the tide of privacy invasion. That kind of scenario may be unlikely, but the fact that it is possible proves that the proposed law is unconstitutional. Lack of opportunity for pre-compliance review before enforcement alone has been found a sufficient basis to render warrantless search regimes unconstitutional.[23] This Bill is constitutionally deficient under the Fourth Amendment because it

[22] *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 529 (1967).
[23] *E.g., Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 493–95 (S.D.N.Y. 2019) (applying Patel to preliminarily enjoin ordinance because it lacked "a mechanism for pre-compliance review."); *MS Rentals, LLC v. City of Detroit*, 362 F. Supp. 3d 404, 419 (E.D. Mich. 2019) (applying Patel to hold ordinance "unconstitutional under the Fourth Amendment because it authorized warrantless, nonconsensual inspections of rental properties without allowing the landlord an opportunity to seek a precompliance review"); *Planned Parenthood of Southwest and Central Fla. v. Philip*, 194 F. Supp. 3d 1213, 1221 (N.D. Fla. 2016) ("Here the state apparently has not made available an opportunity for pre-enforcement review. This, standing alone, renders the state's system facially unconstitutional.").

provide *no* opportunity for the subjects of warrantless searches to secure pre-compliance review *before* they are searched and because it does not meet any warrant exception.

The Fourth Amendment protects more than a substantive right; it embodies a separation of powers principle requiring neutral judges, not executive officials, to determine the justification and proper scope of a search by the government. The warrantless search of business records and homes may be the most expedient option, but it is not a constitutional one.[24]

Thank you,



Hannah S. Marcley
WSBA No. 52692
Pacific Legal Foundation
930 G Street
Sacramento CA 95814
Tel: (916) 419-7111
Fax:)916) 419-7747
HMarcley@pacificlegal.org

[24] *See Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000); *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). ("The mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.").